

# The Picket Post

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December, 2018

## *The Lost Indictment of Robert E. Lee*

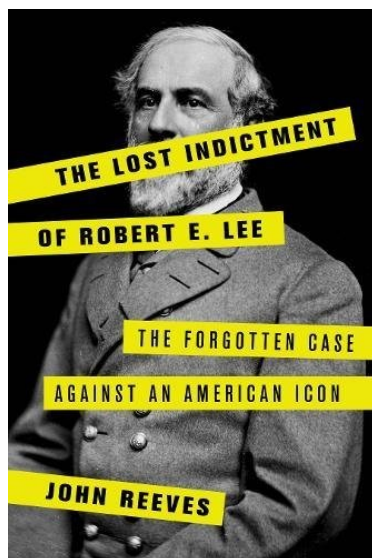
by **Sandy von Thelen**



On October 15, 2018 John W. Reeves came down from Washington D.C. to speak to the Civil War Round Table about a forgotten piece of history the 1865 indictment of Robert E. Lee. His story was a reminder of how much history can get lost and subsumed by the efforts of others to change the facts, cleanse the historical record or just plain re write history. In this case the Lost Cause and the push for national reconciliation had a real hand in disguising just how tenuous the lives of the Confederate leadership was just after the war. It might come as a surprise to some that immediately after the war there was a strong sentiment among Northerners that Lee should be hanged for treason and war crimes.

It was in fact a grand jury in Norfolk, VA that barely three months after Appomattox indicted Robert E. Lee for treason. The judge, John C. Underwood, while admittedly a complete partisan against the Confederacy, instructed the jurors that treason was "wholesale murder" and the Confederate leaders had "hands dripping with the blood of slaughtered innocents." The story of the legal and moral case against Lee which followed on the heels of Appomattox has mysteriously disappeared from historical memory. The early full blown efforts of Jubal A. Early whose numerous articles to the newspapers defending the Confederate record, the position of the influential Southern Historical Society and the country's desire to move on and be reconciled all had a place in obscuring

the immediate clamor for revenge and justice after hostilities had come to a close.



The war wouldn't be considered to be officially over until President Andrew Johnson's proclamation on August 20, 1866. This date was significant because paroled prisoners of war status would change after the war was declared legally over. It would be easy to think that Lee returned to an adoring public in Richmond but as early as Easter Sunday, April 16, 1865 when Matthew Brady arranged to take Lee's picture on his back porch at 707 East Franklin Street, someone had already scrawled, "devil" to the left of the back door. Despite his love of seclusion Lee agreed in late April to give an interview to Thomas Cook of the New York Herald. What emerged

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## **THE WRIGHT STUFF**

December 17, 2018



**KEVIN WALKER**

Keven M. Walker, Chief Executive Officer of the Shenandoah Valley Battlefields Foundation. Mr. Walker came to the Foundation from the Antietam National Battlefield, where he served for 11 years as a Ranger, a Cultural Resources Specialist and the Acting Cultural Resources Program Manager.

During that time, Walker served as a member of the National Park Service's national advisory team on cultural resources and historic preservation and was selected for the GOAL academy, the NPS's highly competitive leadership program. Says Edwin C. Bearss, Chief Historian Emeritus of the National Park Service, "Keven Walker's work has been exemplary; ranking him with the best historic preservation professionals I have known since I began my career."

Continued on page 3

from that interview were some central tenets from the Lost Cause that his primary loyalty lay with his native state Virginia and that the war was not about slavery. These beliefs would become extremely popular in the defeated Confederacy for many decades after the war.

The response from President Andrew Johnson was not the Lincoln-esque, "Let 'em up easy" but rather one from the embittered Tennessean who vowed to make "treason odious." In early April he had declared "treason is the highest crime known in the catalogue of crimes" and "treason must be made odious and traitors must be punished." Lincoln's murder had most Americans mourning intensely and they keenly sought out some sort of justice for the 750,000 war dead. Americans wanted to heal their "republic of suffering" and many believed to punish those who had caused their suffering was only God's will.

It was the Confederate leadership that called out to be punished and the national discussion on treason and traitors centered on Lee as being the, "bloodiest and guiltiest" of all the rebels and there would be "little fitness in hanging any lesser wretch." Lee's critics also accused him of being complicit in the abuse of prisoners of war, an extremely emotional topic for Americans at the time. Lee, as the Confederacy's general-in-chief should have protested the inhumane conditions in Southern prisons.

It was Judge John Curtis Underwood of the US District Court in Eastern Virginia who was to become the compliant instrument of Johnson's vow to make treason odious. He would oversee the indictment of Lee and thirty eight other Confederate leaders. He would preside along with Chief Justice Salmon Chase at the trial of Jefferson Davis and in so doing he would become the most hated man in Virginia in the 19th century. One Virginia paper described him as an "absurd, blasphemous, cowardly, devilish, empirical, fanatical, ghoulis, horrible, ignorant, Jacobinal, lily-livered, maudlin, nondescript, odious, poisonous, querulous, rascally, sycophantic, traitorous, unrighteous, venal, witless, extravagant, Yankeeish zero."

Less partisan former Confederate General, Bradley T. Johnson, who dis-

agreed with the judge on every possible political issue and who worked in the Federal Virginia District Court described him as, "diligent, laborious, prompt, always ready and courteous to suitors and the bar." Attorney General James Speed, former Senator Preston King, Johnson's de-facto Chief of Staff, President Johnson and Judge Underwood caucused in early May and on June 7, 1865 a Norfolk grand jury decided to indict thirty seven leaders of the Confederacy for treason including Robert E. Lee.

While Johnson was preparing to follow through on his vow, Lee had received numerous visitors including General George Meade who entreated him to take the oath of allegiance citing the good effect that would have in setting an example for his fellow Southerners. Shortly afterwards, the Johnson administration released an amnesty proclamation and an application for pardon but Lee discovered that he would not be eligible for either. Into that confusion, U.S. Grant in response to an overture by Lee's attorney wrote to Secretary of War Staunton for Lee to be pardoned. President Johnson and Grant subsequently had several meetings and what transpired was reported by third parties without any certainty as to what was said. However the upshot was that Grant's political clout was such that Johnson elected to stay Lee's prosecution "till further notice." At this point Lee had sent in his application for pardon to President Johnson and on October 2, 1865 just before taking an oath for President of Washington College he took an oath of amnesty which was then sent to and filed by the State Department. President Johnson however had no intention, oath or no oath, of pardoning Robert E. Lee.

The trial of Captain Henry Wirz, the commandant of the notorious Andersonville prison in Georgia kept the pot boiling about whether Lee needed to face the bar of justice. Congressman George Bourwell had declared that Jefferson Davis and Robert E. Lee were "responsible to the country for the slow murder for our soldiers in prison." Lat-

er in public testimony to Congress in early 1866 Lee absolved himself of any responsibility for the suffering of Union prisoners. He stated that he had done all in his power by championing the prison exchange cartel which broke down in 1863. But not all agreed that he was without fault as he upheld the policy that directly led to the breakdown of the system, namely that captured black soldiers would not have the full rights as soldiers and would not be exchanged.

On the eve of the convening of the 39th Congress how to best punish the rebels was on top of the radical Republican agenda. Johnson for his part had advised Congress that the circuit courts in the former Confederate states would not be held until Congress had "an opportunity to consider and act on the whole subject." Johnson had told Chief Justice Chase that he wanted him to preside over the prosecution of "some high crimes and misdemeanors committed against the United States within the district of Virginia." Chase said he would be willing but not until Virginia was no longer under martial law. Judge Underwood could have presided over a treason trial but Attorney General Speed rejected that idea. Then Underwood ventured that the only way to convict Lee and Jefferson Davis in Virginia would be with a "packed jury" which he said he could provide. This idea had extremely negative connotations back then as it would have now.

As the Republicans were mulling their strategy, a shocking story about Lee's actions in 1859 towards an escaped slave was published by the N.Y. Daily Tribune on March 26, 1866. Former slave Wesley Norris accused Lee of stripping his re-captured cousin Mary to the waist, having her whipped and then bathed in brine. In response Lee, was unwilling to publicly defend himself and did not want others to do so either. There can be little doubt that Northern newspapers delighted in exposing Lee for his hy-

pocrisy in his treatment of the Arlington slaves. He was not guilty of any crime but his morality was being laid bare to severe examination. Overall sympathetic historians have attempted to downplay his connections with slavery, but the record clearly shows he was involved with the “peculiar institution” for most of his adult life and tenaciously defended the social system that slavery supported.

In the spring of 1866 Robert E. Lee was still under indictment for treason and the Johnson administration was still adamant about going forward but in fact it decided that the first case it would prosecute would be against Jefferson Davis. The administration had hoped that the case would begin in the June session of the circuit court but in fact Chief Justice Chase himself became an obstacle. First it was the problem with martial law, then it was the wrong legal verbiage of the indictment and then it was the reorganization of the circuit courts without corresponding new assignments for the Supreme Court justices. These were not the only impediments but they all contributed to a delay which pushed the trial to a date in March of 1868. But Justice Chase would again be unavailable because he would be presiding over the impeachment trial of President Andrew Johnson in the U.S. Senate. Yet another unspoken reason for the loss of momentum for the prosecution was the extreme unlikelihood that a jury of Virginians would vote to convict any of the former Confederate leaders of treason.

With the passage of the 14<sup>th</sup> Amendment the idea of a trial came to an unceremonious end. Chase’s interpretation was that since any former Confederate leader who had taken an oath to uphold the Constitution would be prevented from holding public office any further prosecution would amount to double jeopardy which was prohibited under the Constitution. Then on Christmas Day 1868 Andrew Johnson published a final proclamation granting full amnesty to all rebels including those under indictment.

Despite Johnson’s best efforts to punish the Confederate leadership that Christmas Day amnesty gave Lee, Davis and the other thirty seven former

Confederates under indictment a full pardon for treason against the United States. On Feb. 11, 1869 William Evarts, Attorney General, entered a nolle prosequi for all thirty nine indictments that had been found against the Confederate leaders by the federal court in the state of Virginia. Lee had played an active role in laying out his own defense in the last five years of his life and that gambit was picked up and brought solidly home by Jubal Anderson Early as “the fearless guardian of the fame of Lee.” The “Lost Cause” proponents achieved by any measure astonishing success. As one historian opined, “In the popular mind, the Lost Cause represents the national memory of the Civil War; it has been substituted for the history of the war.” In 2011 the Pew Research Center poll determined that 48 per cent of Americans believed states’ rights was the main cause of the war compared with just 38 percent who felt that slavery was the main cause. A McClatchy – Marist poll four years later reported that 41 per cent of all Americans still did not believe “slavery led the nation into civil war.” Certainly the Civil War history I studied never made mention of Lee’s indictment for treason and still spoke of states’ rights as a leading cause for the rebellion.

Sandy von Thelen  
December 7, 2018



KEVIN WALKER, CONT'D

Walker was formerly the Executive Director of The Walker Foundation for Historic Preservation in Charles Town, West Virginia. He has appeared on several Maryland Public Television documentaries focusing on the Antietam battlefield as well as historic homes in Washington County, Maryland. He is the author of “Antietam: A Guide to the Landscape and Farmsteads,” published in 2010.

Walker came to the Foundation in June of 2014. Over the past two years, under Walker’s leadership, the Battlefield’s Foundation has tackled some of the largest preservation projects in its history; preserved over 600 acres of battlefield land; opened two visitor centers and a 600 acre full service battlefield park; more than tripled its youth involvement; and strengthened its partnerships nationwide.

The Picket Post | December 2018

## Upcoming

Terry Heder

SUBJECT TBD

## ROTUNDA ROOM

**Westminster Canterbury  
of the Blue Ridge, Pantops**

See: [charlottesvillecwr.org](http://charlottesvillecwr.org)

**Dinner Menu:** Choice of  
prime rib, grilled salmon,  
or crab cakes

**Dinner is optional,  
but reservations are required.**

Please respond to  
Sandy von Thelen  
971-8567 (W) or 202-7064 (H)  
or make your reservation on the  
webpage before 10:00 AM  
Thursday, December 13th, 2018.

## The Picket Post

The monthly newsletter of the Charlottesville-Albemarle County Civil War Round Table.

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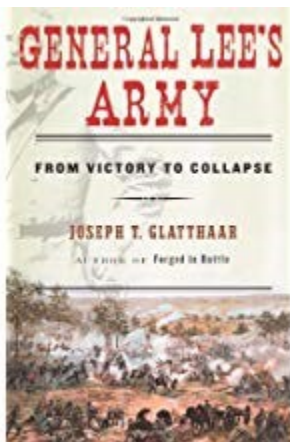
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## BOOK REPORT

You cannot say that University of North Carolina professor Glatthaar (Partners in Command) did not do his homework in this massive examination of the Civil War—era lives of the men in Robert E. Lee's Army of Northern Virginia. Glatthaar spent nearly 20 years examining and ordering primary source material to ferret out why Lee's men fought, how they lived during the



war, how they came close to winning, and why they lost. Glatthaar marshals convincing evidence to challenge the often-expressed notion that the war in the South was a rich man's war and a poor man's fight and that support for slavery was concentrated among the Southern upper class. Lee's army included the rich, poor and middle-class, according to the author, who contends that there was broad support for the war in all economic strata of Confederate society. He also challenges the myth that because Union forces outnumbered and materially outmatched the Confederates, the rebel cause was lost, and articulates Lee and his army's acumen and achievements in the face of this overwhelming opposition. This well-written work provides much food for thought for all Civil War buffs. (Mar.)

From Publishers Weekly

The Shenandoah Valley Battlefields Foundation presents

**"GIVE THE ENEMY NO REST":  
THE 1864 SHENANDOAH CAMPAIGN**

**A NATIONAL CIVIL WAR CONFERENCE**

April 10-13, 2019 Front Royal, Virginia

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### 2019 National Conference: "Give the Enemy No Rest": The 1864 Shenandoah Campaign

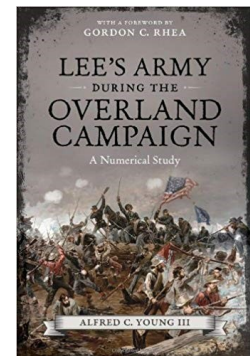
Based in Front Royal, Virginia  
(April 10-13, 2019)

The Shenandoah Valley Battlefields Foundation's 4th Annual National Civil War Conference will focus on Sheridan's 1864 Shenandoah Campaign, the largest and costliest campaign ever fought in the Valley. The conference will include talks, programs, special events, and tours of Third Winchester, Fisher's Hill, and Cedar Creek - all featuring the finest historians in the nation.

Guides and speakers will include Gary Ecelbarger, Caroline E. Janney, Robert K. Krick, William Miller, Jonathan A. Noyalas, Scott C. Patchan, Ralph Peters, Nicholas Picerno, and Jeffry Wert.

The cost for the full conference is \$425 for SVBF members, \$475 for non-members. Guests can also choose one or more individual days with a la carte pricing.

## BOOK REPORT



The initial confrontation between Union general Ulysses S. Grant and Confederate general Robert E. Lee in Virginia during the Overland Campaign has not until recently received the same degree of scrutiny as other Civil War battles. The first round of combat between the two renowned generals spanned about six weeks in May and early June 1864. The major skirmishes—Wilderness, Spotsylvania, and Cold Harbor—rivaled any other key engagement in the war. While the strength and casualties in Grant's army remain uncontested, historians know much less about Lee's army.

### INCLEMENT WEATHER

Check the meeting status with

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